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June 25, 2009

Hon. Douglas H. Shulman
Commissioner of Internal Revenue
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Administration's Proposals – Tax Information Reporting and Withholding

Dear Commissioner Shulman:

In its capacity as advisors to the Internal Revenue Service (IRS) on withholding and reporting issues, the Information Reporting Program Advisory Committee (IRPAC)¹ would like to take this opportunity to share with you some thoughts with regard to the Administration's tax proposals contained in the Treasury "Green Book" released May 11, 2009. A review of that 130 page document reveals a number of information reporting and withholding issues, both domestic and foreign, that will have a significant impact on payors and withholding agents, in the financial community and in the private sector in general, but that will also impose significant new burdens on the Internal Revenue Service and the taxpayer community.

The following discussion examines a number of the Green Book proposals and identifies issues and concerns with regard to them. The first part looks at all the guidance projects that will be necessary and concludes that it would be extremely difficult, if not impossible, for the IRS to issue guidance and the payor community to implement the required changes before the proposed effective date of January 1, 2010.² The second section looks more closely at some of the critical aspects of the proposals and raises questions as to scope and intent, and identifies some important implementation concerns. This is a preliminary look at the impact of these proposals; it is not intended as

¹ IRPAC was established in 1991 in response to an administrative recommendation in the final Conference Report of the Omnibus Budget Reconciliation Act of 1989. Since its inception, IRPAC has worked closely with the IRS to provide recommendations on a wide range of issues intended to improve the information reporting program and achieve fairness to taxpayers. IRPAC members are drawn from and represent a broad sample of the payer community, including major professional and trade associations, colleges and universities, and state taxing agencies.

² Most of the proposals carry an effective date of the first calendar year after passage of the statute. If passed anytime in 2009, even at year's end, that would mean an effective date of January 1, 2010.

a comprehensive analysis of all potentially relevant proposals in the Green Book. Once legislative language has been introduced we will re-examine the proposals and provide you with additional comments.

A. Effective Date/Implementation Guidance Issues

If adopted in the form proposed, the Administration's tax proposals will require significant amounts of guidance from the IRS, and the devotion of significant IRS resources, in order to permit the proposals to be implemented effectively. Payors, withholding agents, intermediaries, and beneficial owners will not be able to take steps to implement the required procedures until such guidance is issued. Thus, the IRS will need to act quickly, in particular if the effective date provisions of the Administration's proposals are not changed.

The matters on which guidance will need to be issued include the following:

- **Qualified Intermediary ("QI") Program:** In a number of respects, the proposals create disadvantageous treatment for foreign intermediaries that are not QIs. As a result, the adoption of the proposals is likely to lead to a substantial increase in the number of applications from intermediaries seeking to become QIs. The need to process these applications quickly may impose a significant burden on the IRS, in particular with respect to applications from intermediaries that are not located in one of the 59 jurisdictions whose "know-your-customer" rules have previously been approved by the IRS for this purpose.³ Moreover, the QI program currently contemplates only intermediaries that conduct financial services businesses. Many non-U.S. persons that act in agency capacities negotiate royalty arrangements relating to copyrights, patents, and other intangible use agreements in a multitude of industries including pharmaceuticals, retail operations and heavy manufacturing. If the proposal is enacted as described the scope of the QI program will need to be expanded to accommodate payors in these other industries.
- **Refund Procedure:** Two of the proposals – the proposal requiring withholding on FDAP income paid to a non-QI and the proposal requiring withholding on gross proceeds paid to certain non-QIs – contemplate a refund procedure for non-U.S. persons who provide documentation after payment is made. These proposals will require the development of a refund procedure, as well as guidance

³ According to the IRS website, as of June 18, 2009, the "know-your-customer" (KYC) rules of only 59 jurisdictions had been approved and some of the approvals apply only to limited categories of financial intermediaries. Currently, only institutions in approved KYC countries may become QIs.

regarding the types of documentation that will be acceptable for purposes of establishing a non-U.S. person's entitlement to a refund.

- **Gross Proceeds Withholding:** The gross proceeds withholding proposal applies only to non-QIs located in a jurisdiction that does not have a "satisfactory" exchange of information program pursuant to a comprehensive income tax treaty. Guidance will be required as to which treaties qualify for this purpose.
- **Disclosure of Beneficial Owners of Foreign Entities:** The Administration has proposed that FDAP payments made to certain foreign entities be presumed made to an unknown person subject to 30% withholding unless the entity provides documentation of its beneficial owners. The IRS will need to provide guidance regarding the types of documentation that will be acceptable for the purpose of foreign entities disclosing the identities of their beneficial owners, as well as provide rules for what the withholding agent should do with that information, and what the consequences are if the information is not provided in an appropriate manner.
- **Exceptions to Withholding Tax:** A number of the proposals provide Treasury with authority to create exceptions from various withholding and reporting obligations. The IRS will need to act quickly to provide guidance adopting and defining the scope of these exceptions and how a payee may qualify for one.
- **Certified TINs from Contractors and Voluntary Withholding:** The proposal to obtain certified TINs from contractors will require regulations describing any grandfathering rules for current accounts as well as the form and timing for certifying new accounts. This proposal also provides for a withholding regime whereby the payee can require the payor to withhold and elect from among four alternative withholding tax rates. The IRS will need to develop new procedures, and detailed guidance, to implement this withholding provision.
- A number of other proposals could require the development of new forms or revisions to existing forms, including (i) the gross proceeds withholding proposal; (ii) the provision relating to information reporting for rental property expense payments; (iii) the information reporting provision relating to certain payments to corporations; (iv) the provision requiring reporting of transfers of money or property to foreign accounts; (v) the requirement to file FBAR account disclosure with tax returns; (vi) third-party information reporting regarding transfers of assets to foreign financial accounts, the establishment of foreign financial accounts and the establishment of offshore entities;

and (vii) the provision requiring reporting regarding private separate accounts of life insurance companies.

The IRS will need sufficient time to address the foregoing issues in a thoughtful manner and provide rules that can be implemented effectively by payors, withholding agents, intermediaries, payees, and beneficial owners. Most of the proposals are proposed to be effective January 1 of the year following the year of enactment, which would not provide sufficient time for the IRS to engage the financial services industry in meaningful discussions and provide the needed guidance, or for payors, withholding agents, intermediaries, payees, and beneficial owners to implement the guidance after it has been issued. In particular, a number of the proposals would require changes to tax withholding systems maintained by withholding agents. Therefore, IRPAC hopes that any legislation enacted contains either a later effective date than the proposals currently contain, or a provision that certain of the proposals will only become effective after the publication by the IRS of implementing guidance. Experience with the current QI process has shown that implementation is a multi-year process.

Implementation of the proposals will require substantial efforts by withholding agents and intermediaries. In many respects, the proposals are complex and their application to particular circumstances may be unclear. Thus, if these proposals are adopted without a significant change in the effective date, IRPAC recommends that the IRS consider relaxing the application of penalties that may otherwise be applicable during some specified transitional period, to the extent withholding agents and intermediaries make a good faith effort to comply with the requirements.

B. Issues Raised by Specific Proposals

1. Refund Issues

The provisions requiring withholding on FDAP income and gross proceeds payments made to non-QIs both contemplate beneficial owners being able to obtain refunds of amounts withheld in excess of their substantive tax liability. The IRS will need to issue clear guidance regarding the types of documentation that will be acceptable for purposes of establishing (i) that tax was withheld and (ii) that the tax is attributable to a particular person, so that non-U.S. persons can establish their right to a refund. In addition, the IRS will need to develop a procedure that allows refunds to be processed quickly and efficiently and to set up one or more operations centers to process refund requests. We understand that currently non-U.S. persons who receive U.S. source income through pooled accounts have had difficulty in obtaining refunds of withheld taxes that exceeded their tax liability because they had not received a Form 1042-S issued in their own name. The documentation rules will need to contemplate this issue, and the refund procedures should be designed to

permit the issuance of refunds even if income is received through a pooled account.

In addition, many non-U.S. individuals have experienced significant delays in obtaining refunds of amounts withheld in excess of their actual liability, due to the need for an individual to obtain an Individual Taxpayer Identification Number (ITIN) to obtain treaty relief. The ITIN process is heavily tied to legal concerns relevant to immigration issues, which for the most part do not apply to those who experience withholding on FDAP income, the receipt of which does not require entry into the United States. New, faster and more streamlined refund procedures will need to be developed to permit required refunds to be issued in an efficient manner. Further, the current ITIN process, which can be particularly arduous for persons who may never enter the US and may not speak English, will need to be simplified.

The gross proceeds withholding proposal contemplates a procedure whereby non-QIs may claim a refund on behalf of their direct account holders if they (i) identify all of their direct account holders that are U.S. persons and (ii) report all reportable payments received on behalf of their U.S. account holders. Implementation of this refund mechanism will require guidance on a number of issues, including (i) the procedure for identifying U.S. account holders and documenting that all such holders, and all relevant income, have been disclosed;⁴ and (ii) whether indirect account holders may receive a refund through this process and, if not, specify an alternative process for such account holders to obtain refunds.

More generally, because gains from the disposition of securities rarely generate tax liabilities for non-U.S. persons, it will be particularly important to create a streamlined refund process that will return excess withholdings in the context of the gross proceeds withholding proposal. Currently, the process for reclaims of backup withholding on gross proceeds from a non-U.S. investor's sale of securities is complex, confusing, and costly, and when pushed further by the proposed legislation, the lack of an efficient reclaim route may seriously discourage investment in the United States.

The descriptions of the proposals in the Green Book indicate that the refund processes will apply to foreign persons that are subject to withholding tax in excess of their income tax liability. Hopefully the statute and report, or the IRS through early guidance, will clarify that U.S. taxpayers also will be entitled to refunds or credits, upon the provision of sufficient identifying information.

⁴ We suggest that either the statute or the regulations limit this disclosure requirement to only those U.S. account holders who have income relating to the transaction or transactions that relate to the refund claim.

2. Exceptions to Withholding and Reporting Obligations

A number of the proposals grant to Treasury the authority to exclude certain categories of beneficial owners or certain activities from the application of the new rules being promulgated. In many—but not all—of the proposals, the proposal states that this authority is intended to ensure that the adoption of the proposals does not disrupt the normal operation of the capital markets. However, the exceptions do not appear to be self-executing. Thus, unless clarified in the legislation, it will be important for the IRS to issue prompt guidance regarding these exceptions, and to interpret the exceptions broadly, to facilitate their implementation in a manner that is not disruptive to withholding agents' and intermediaries' operations and, more generally, standard capital markets transactions. In addition, IRPAC would encourage a review of the proposals beyond the financial services industry to determine the impact on the rest of the business sector.

3. Issues Relating to QI Program

a. KYC Rules. Adoption of the Administration's proposals may lead to a substantial increase in applications for QI status, in particular from financial intermediaries that are located in jurisdictions that are not currently included in the list of jurisdictions with approved KYC rules. The IRS will need to devote sufficient resources to reviewing these applications so that financial intermediaries who wish to become QIs will be able to do so, and will be able to develop the required compliance measures, prior to the effective date of the proposals.

b. Non-Financial Institutions. The QI program currently extends only to intermediaries that conduct financial services businesses. Throughout the rest of the business sector, many non-U.S. persons act in agency capacities. For example, they may negotiate royalty arrangements relating to copyrights, patents and other intangible use agreements in a multitude of industries, including pharmaceuticals, retail operations and heavy manufacturing. This is particularly significant in the arts world where producers, promoters and other agents operate as the prime negotiators for music compositions, original art, and other arts media as well as of the actual performances. In some cases, union involvement, as well as the imposition of certain legal restrictions to protect artists' rights, requires negotiation and payment through such an agent. International transportation and shipping operations also heavily rely on agents to facilitate the movement of raw and finished goods and commodities around the world.

Though it is not clear that this result is intended, IRPAC is concerned that the Green Book proposals may sweep these non-financial industry intermediary transactions into the QI rules. Currently, agents in these positions submit Form W-8IMY along with the beneficial owners' Forms W-8 or W-9 and

statements supporting the allocation of related income. This process currently works. If the proposal is adopted and QI rules are extended to these non-financial sectors, implementation should await IRS issuance of guidance on the expansion of the QI program, including consideration of how KYC principles may be applied outside the financial services industry, so that persons acting as intermediaries in these industries can become QIs and adopt the required procedures. Eliminating the current non-QI process prior to the development of a workable QI system in these contexts could pose significant hardship on many industries. Any negative impact on American abilities to acquire needed technology as well as sustain a healthy cultural exchange with other countries also should be examined.

c. Financial Institutions. The proposal grants Treasury the authority to provide that a financial institution may be a QI only if all commonly controlled financial institutions also are QIs. Prior to adopting any guidance under this provision, the consequences of such a requirement should be carefully considered. QI status can impose significant burdens on a financial institution. From a compliance perspective, there may be little benefit to requiring financial institutions to become QIs where those financial institutions do not conduct a significant business as a financial intermediary, do not hold U.S. securities, or do not hold securities on behalf of U.S. customers. In addition, for small financial institutions, modest compliance benefits may be outweighed by the burdens that QI status would impose on the institutions. IRPAC is concerned that, if this authority is exercised, it may provide a disincentive for financial institutions to become QIs and for current QIs to remain QIs. IRS may wish to consider implementing this provision on an individual basis – e.g., reserving the right to insist that some or all of a particular financial institution's affiliates become QIs as a precondition to approving that financial institution's application to be a QI, rather than imposing it as a general rule that applies to all QIs. Furthermore, foreign financial institutions that are controlled by U.S. persons are treated under current law as U.S. payors subject to the full panoply of information reporting and withholding requirements. This should obviate the need to require these institutions to become qualified intermediaries.

d. Current QI Opt-Out Standards. Another potential issue of concern to IRPAC relates to the QIs' apparent inability to "opt out" with respect to the requirement to report all income for their U.S. customers. This would seem to be a substantial departure from the basic compact set forth in the current standard QI agreement, which allows QIs to choose not to act as QIs with respect to a payment or a class of payments, thereby mitigating the burden that QI status may impose. Such a significant change should be approached with great caution; hopefully enactment will be deferred until its impact on the international markets can be determined. As with the discussion about financial institutions above in subpart (c), the lack of ability to opt out of

reporting may serve as a disincentive for financial institutions to become QIs and for current QIs to remain QIs.

e. Amending Current QI Agreements. QI agreements permit the IRS to amend the agreements “if the IRS determines that such amendment is needed for the sound administration of the internal revenue laws or internal revenue regulations.”⁵ The changes contemplated by the Administration’s proposals should be viewed as falling within the scope of this authority. However, in order to facilitate QIs’ ability to implement the proposals in a careful and systematic manner, to the extent allowable by the statute, the IRS should consider making the proposals effective only upon the next renewal of a QI’s agreement with the IRS (but not earlier than issuance of a revised standard QI agreement), rather than amending outstanding agreements.

f. Gross Proceeds Withholding. The gross proceeds withholding proposal applies to proceeds paid to a non-QI that is located in a jurisdiction that is not a party to a comprehensive income tax treaty that provides a “satisfactory exchange of information program.” Under current law, gross proceeds generally are not subject to withholding when paid to a non-US person. Therefore any withholding proposal – even one that applies only to non-QIs that are located in jurisdictions without satisfactory programs – will require all withholding agents to create a new reporting, withholding, refunding, and depositing function within their payment systems. In addition, withholding agents will not be able to determine which information exchange programs are “satisfactory” without guidance from the IRS. The IRS should issue guidance quickly to permit affected accounts to be identified and accounted for properly prior to the effective date of the proposal. Experience with reclaims of backup withholding on foreign investors’ security sales show that they are complex, confusing, and costly; if another reclaim procedure is hastily added to the mix without being well designed and implemented, the lack of a fair reclaim route could seriously discourage investment into the United States.

To facilitate the objective of issuing clear guidance quickly, IRPAC would hope that the statute and report direct that all comprehensive income tax treaties will be treated as acceptable for this purpose absent a specific IRS determination to the contrary. If left unclear in the legislation, the IRS should consider issuing a Notice stating the same thing. Similarly, the IRS should exercise the proposed regulatory authority relating to tax information exchange agreements by providing that the exchange of information provisions of such agreements also qualify, except to the extent the IRS specifically provides otherwise.

4. Disclosure of Beneficial Owners of Foreign Entities

⁵ See Section 12.02 of the standard QI Agreement, set forth in Revenue Procedure 2000-12.

The proposal that would require that withholding agents obtain documentation of a foreign entity's beneficial owners as a prerequisite to granting withholding tax relief in respect of FDAP income is somewhat ambiguous. In particular, the Green Book's summary of the proposal does not indicate what a withholding agent is required to do with the beneficial owner information once it has been obtained. Thus, it is difficult to assess fully the potential implications of the proposal. Our preliminary analysis has identified two possible interpretations of the description. The discussion below sets forth our analysis of the implementation issues for each of these interpretations.

First, the proposal could be interpreted strictly as an information-gathering tool for the IRS. This interpretation would require withholding agents to obtain beneficial owner information and, presumably, transmit it to the IRS to provide the IRS with an additional means of identifying situations in which persons are improperly obtaining relief from withholding tax. Second, the proposal may require withholding agents not only obtain the information from foreign entities, but also use it to assess such entities' substantive entitlement to withholding tax relief. Although IRPAC believes that beneficial owner information could be useful to the IRS in some circumstances in administering the withholding tax system, both interpretations present significant practical implementation challenges. However, as discussed below, we believe that applying the proposal in a manner that would revise the substantive rules for claiming withholding tax relief raises substantial legal and practical issues that would prevent it from being implemented successfully.

The following example illustrates potential consequences of the second interpretation, which would require that withholding agents use the information obtained from foreign entities to assess such entities' substantive entitlement to withholding tax relief: If a corporation organized under the laws of Country A discloses that its shareholders are resident in Country B, the withholding agent could be required to deny relief under the United States-Country A income tax treaty, either (i) because it would be required to treat the shareholders as the beneficial owners of the payment, or (ii) because it would be deemed to have reason to know that the Country A corporation may not satisfy the treaty's limitation on benefits provision, and may therefore be ineligible for treaty relief, as a result of the fact that its shareholders are located in another jurisdiction. It should be noted that the first consequence would require a change in existing regulations, while the second could result under the existing "knowledge or reason to know" rules applicable to Form W-8 treaty claim validation. As discussed in greater detail below, the mere fact that a foreign entity's shareholders may be persons who themselves would not be eligible for benefits under a particular treaty is normally not sufficient to permit a conclusion that the entity itself is not eligible for treaty benefits. Thus, regulations implementing this requirement should clarify that the information

collected under this provision will not alone be sufficient to give a withholding agent reason to know that a foreign entity is not eligible for treaty benefits.

Either of the consequences described above would represent a fundamental re-thinking of certain basic and long-standing aspects of the withholding tax rules and thus would raise substantial legal and practical issues. A look-through approach would be viewed by foreign investors and foreign governments as overriding the United States' obligations under its existing income tax treaties, as a legal entity is entitled to claim treaty benefits at the entity level if (i) the entity is a resident of the treaty country, and (ii) the entity satisfies any limitation on benefits provisions. In addition, the implementation of this approach would create substantial complexity for withholding agents, intermediaries and beneficial owners. For example, determining eligibility for withholding tax relief at the level of the ultimate beneficial owners of the entity would require a number of highly complex determinations, potentially involving the interpretation of a number of different treaties, especially if an entity is owned through tiers of entities.

If this substantive approach is not implemented as a true look-through rule as described above, but requires a withholding agent to review ownership information under the "knowledge or reason to know" standard, it also would create substantial complexity for withholding agents and increase the risk to withholding agents of providing reduced rates of withholding to legal entities. This would likely increase the volume of payments for which reduced rates were not provided, and increase the volume of refund requests that the IRS would be required to process.

Another complexity of this substantive approach relates to the fact that non-U.S. taxpayers are required to obtain a taxpayer identification number (TIN) to obtain treaty relief in many cases. If the shareholder disclosure requirement were implemented so as to require that withholding agents determine the validity of treaty claims based on the residence of a foreign entity's beneficial owners, not only would the foreign entity be required to obtain a TIN, but also its shareholders, and in some cases its shareholders' shareholders, would be required to obtain a TIN, which would make obtaining effective treaty relief a practical impossibility in many cases.

For these reasons, we believe that an application of the proposal that would require that the information obtained be used to assess an entity's substantive entitlement to treaty relief would be unadministrable.

Alternatively, the requirement for a foreign entity to disclose its beneficial owners could be implemented as a disclosure requirement that does not affect a foreign entity's substantive entitlement to withholding tax relief, if carefully drafted and limited in application. Under this approach, withholding agents would communicate to the IRS (in a manner to be defined) the

beneficial owner information obtained, and the IRS could then use the information to assist in its enforcement efforts. Although such a disclosure requirement could avoid some of the issues inherent in the substantive approach described above – in particular, the risk that it would be viewed as overriding tax treaties – it nonetheless would impose substantial burdens on withholding agents, foreign entities and their owners if not structured carefully.

Guidance will need to be provided on a number of issues, including the following:

- Regulations will need to describe whether withholding agents are required to transmit the beneficial owner information collected to the IRS and the manner in which such information is to be transmitted. In addition, to the extent these regulations impose new reporting requirements, withholding agents will need to be given sufficient time to implement any required systems enhancements. We also recommend that the IRS give some consideration to developing a framework that will allow it to use the information effectively.
- Either the statute and report, or the regulations, should provide that the beneficial owner information provided under this requirement will not alone be sufficient to give a withholding agent reason to know that a foreign entity is not eligible for treaty benefits. Qualification for benefits under the limitation on benefits provisions of an income tax treaty frequently requires a complex analysis. The mere fact that a withholding agent obtains information that indicates that a foreign entity's shareholders may be persons who themselves would not be eligible for benefits under a particular treaty is normally not sufficient to permit a conclusion that the entity itself is not eligible for treaty benefits.
- It will be necessary for regulatory guidance to provide for the exceptions to the disclosure requirement suggested in the Green Book's description of the proposal, and the IRS should construe those exceptions broadly, in order to permit the proposal to be implemented effectively.
- The proposal includes as a possible exception "entities that enter into an agreement with the IRS to collect documentation for all owners and report all U.S. non-exempt owners to the IRS." This exception does not appear to refer to any existing regime. Thus, if the legislation adopts this exception, the IRS will need to provide detailed guidance outlining how this new reporting system is intended to operate.

In addition, absent further clarification in the statute and report, IRS guidance implementing this provision also will need to provide clarification on a number of other issues, including the following:

- The Green Book does not specifically indicate whether foreign entities that provide the required beneficial owner documentation after a payment is received will be eligible to obtain refunds of tax withheld as a result of their initial noncompliance. We believe that such refunds should be available upon the provision of the required documentation, subject to the concerns expressed elsewhere in this letter regarding the refund process.
- It is not clear how broadly the reporting requirement will apply if a foreign entity's beneficial owners themselves are foreign entities, and whether the owners of those entities will need to be disclosed.
- If a foreign entity provides disclosure regarding some, but not all, of its beneficial owners, it is not clear whether it will be eligible for withholding tax relief to the extent it has complied with the disclosure requirement.

Finally, in order to permit withholding agents to implement the proposal, the IRS will need to issue clear guidance describing the types of documentation regarding the entity's beneficial owners that withholding agents will be required to obtain. To simplify the implementation and application of the proposal, the IRS should consider the following:

- The disclosure requirement could be implemented by adding a new section to Form W-8BEN, in which information to satisfy the disclosure requirement would be set forth.
- A simple procedure for foreign entities to establish that they are eligible for one of the exemptions from the disclosure requirement will need to be created. If the disclosure requirement is implemented through Form W-8BEN, a check box could be included to permit a foreign entity to certify that it is eligible for an exemption.
- To reduce the burden on foreign entities and withholding agents, the disclosure requirement could be limited to (i) U.S. shareholders and (ii) shareholders that satisfy a specified threshold of ownership (e.g., applying only to shareholders owning 10% or more of the entity's equity). Non-U.S. entities that have no U.S. shareholders, or that have no shareholders whose ownership exceeds the specified threshold, are unlikely to be used as vehicles for tax avoidance and should be given a simple means of establishing that fact (e.g., a check-box on Form W-8BEN).

5. Reporting by Government Entities.

This proposal seems to accelerate and expand part of IRC section 3402(t) with respect to the reporting of transactions by government agencies. Though it does not seem to require the 3% withholding required by section 3402(t), it appears to broaden its burden onto all government agencies not just Federal, State and large local governments. The smaller local governments which are not subject to section 3402(t) will be caught cold; larger governments subject to section 3402(t) have not yet begun to implement the provision which was just delayed in January to be effective January 1, 2012. IRS has published proposed regulations on section 3402(t) but it is not clear whether the exemptions in those regulations (particularly the de minimis exception for transactions under \$10,000, and the exception for transactions in connection with contracts in existence on the effective date) would apply to this reporting provision. In addition, payment card transactions reported under this provision would be reported a second time under section 6050W. IRS needs to develop guidance on the interrelationship of all these provisions, along with IRC section 6041, to minimize overlap and duplication; multiple reports of the same transaction confuse taxpayers and increase IRS problem resolution efforts. For additional details on these interrelationship issues, see the letters IRPAC submitted in response to proposed regulations on section 3402(t) (REG-158747-06), and Notice 2009-19 (seeking comments on IRC section 6050W.)

6. Reporting Of Rental Property Expenses By Individuals.

For over sixty years, the Code has required reporting of rental expenses only by those in a trade or business. This proposal seems to extend that requirement to individuals who rent out their homes. Though it provides exceptions for some landlords in the military or those who do only short-term rentals, it will fall on many unsuspecting and otherwise compliant taxpayers. The elderly could be particularly hard-hit. Assuming this provision is inserted into IRC section 6041, those to whom it applies would also have to obtain the payee's TIN or backup withhold. Certified TINs could be required if another proposal is adopted. Backup withholding would also require depositing, filing of Form 945, and potentially dealing with B Notices (CP2100) and Penalty Notices (Form 972CG). Most individual taxpayers are totally unprepared for this responsibility. IRPAC also is concerned about the burden this provision would place on the IRS, which would need to mount a significant and immediate campaign to educate the taxpayer population about this new reporting requirement.

7. Reporting of Payments to Corporations.

Since the 1950's, the general rule in regulations under IRC section 6041 has been that payments to corporations made in the course of a trade or business are not reportable. A decade ago this rule was modified to require

federal agencies to report service payments to corporations. In addition, all payors must report payments to medical and legal service providers. This proposal would completely rescind the general regulatory exception. Any payment that is reportable under IRC section 6041 is also subject to the TIN solicitation rules and backup withholding. Since payments to corporations have not been reportable, many payors have not striven to obtain TINs from these currently exempt payees. As a result, rescinding the corporate exemption for current accounts could require payors to undertake a significant mass mailing to obtain TINs, or failing that, backup withhold. It will also require a clarification of how this provision interrelates with check-the-box procedures, disregarded entities, and sub-chapter S corporations.

Even if the IRS could immediately provide guidance on these issues, realistically it would not be possible to be ready by the proposed effective date. In addition, the expansion of reporting also expands the need for the IRS to immediately finalize the "QPCA" regulations or eliminate the duplication between sections 6041 and 6050W. Without such actions, payors making electronic payments will not be able to meet the requirements. IRPAC also is concerned about whether the IRS will be able to use the information reported. Since reporting is on a cash/calendar basis, and many corporations utilize the accrual method of accounting and/or a fiscal year, it is not clear how the IRS would "match" these new and numerous information returns to a tax return. Reporting of unusable information serves no purpose and should be avoided.

8. Certified Contractor TINs and Voluntary Withholding.

This provision contains two elements: (1) require payors under IRC section 6041 to obtain certified TINs from the independent contractors with which they do business and perform TIN matching on the data provided, and (2) permit the payee to require the payor to withhold at one of 4 specified rates. The concerns here include:

- With regard to the TIN requirements, it is not clear whether this proposal is prospective only. If it applies to existing merchant relationships, since certifications have not heretofore been required, every payor would need to contact every payee for a certification. The time and expense to do this would be enormous, a significant additional expense coming at a time of economic uncertainty. Merchants would receive many certification requests and, if one is overlooked, could be subject to backup withholding. Some merchants are just hanging on during these tough economic times; the cash flow disruption of 28% of an expected payment could be enough to put the marginal business out of business.
- As with many of the other proposals, implementing the "voluntary" withholding provision in the context of electronic payments would be

complicated if not impossible. The current card system has no capacity to assist cardholders in withholding; this includes backup withholding 28%, 3% withholding by government entities, or "voluntary" withholding of one of four additional rates.

- As with so many of the other proposals, the burden on the IRS to get out immediate and comprehensive guidance, not only to filers but to the entire business community including millions of small entrepreneurs, would be a daunting task. Filers would need to know immediately whether they needed to contact all their suppliers, what form/letter to send, and time frames. They would need guidance so they could set up processes to do this, and to process responses and field questions from confused merchants. The IRS would need to notify filers of corporate returns, partnership returns, and individual returns with Schedules C, along with any new businesses started-up this year, informing them of the need to certify to their payors.

We offer the above comments and suggestions in the hope that any legislation enacted will clarify as many issues as possible, and that the burden on the IRS to issue immediate and complex guidance will be minimized. We also offer these comments in response to your recent request that the financial services industry submit suggestions regarding ways that the IRS can better pursue unreported offshore income. IRPAC anticipates providing additional comments in the future regarding the broader issue of approaches that the IRS may use to combat offshore tax avoidance.

We are available at your convenience to discuss any of these issues with you or your staff. If you have any questions, please contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jon Lakritz', with a long, sweeping horizontal line extending to the right.

Jon Lakritz

Chairperson, 2009 IRPAC